A LITTLE TREATISE OF BAILE AND MAINEPRIZE.

Written by *E. C.* Knight, and now Publiſhed for a generall good.

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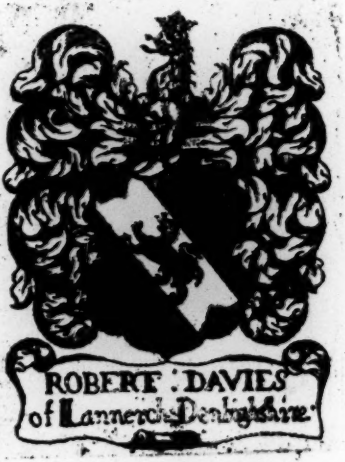
ROBERT : DAVIES
of Lannerch Denbighshire

THE TABLE.

CHAP. 1.

Chap. 1.

Whereof Baile or Maine-prize is Derived.

This word Baile, is (as I take it) deriued of the French word Bailer, which signifieth to deliuer, because he that is Bailed, is as it were deliuered into the hands and custody of those that are his Pledges and Sureties.

This word Mainepryze, is derriued out of two French words, That is to say, Maine, which signifieth an hand, &c. Of this word Pryze, which signifieth taken, because hee that is taken to Mainepryze, is as it were taken into their hands and custody that be his Sureties.

2. Chap. The Description of Baile and Maine-prize.

Baile or Mainepryze is when a man detained in Prison for any offence, for which he is Bailable

able or Maineprizeable by, Law is by a compleate Judge or Judges, of that offence vppon sufficient Surety found for his appearance and peeleing of his body, deliuered out of Prison.

This description doth aswell belong to the one as to the other: And yet I finde some difference betweene them in our Bookes, and therefore for the more further, and more speciall vnderstanding of the same, I thinke it conuenient to note such difference as appeares in our bookes to be betwixt them.

3. Chap. The difference betweene Baile and Maineprize.

33. E. 3. tit. Mainpr. 12. H. ca. 4.

FIrst, hee that findeth Baile doth finde Surety onely to answere that speciall matter. But hee that findeth Maineprize, findeth Surety to appeare and answere vnto that cause whereof hee was imprisoned, and touching all other matters and causes that shalbe objected against him.

Secondly, the Pledges and Surety of him that is deliuered to Baile, may imprison him, whose Surety they are: for chiefe Iustice Stuard in 33. *Edw.* 3. saye, that they were his gaolers or keepers, and if they suffered him to escape, they should answere for the same.

Thirdly,

Thirdly, the Etymologie of either of them both thewe and manifeſt the difference betwixt them, for in the one, the Priſoner is deliuered by the Iudge, Iudges, or Courts into the hands, and as it were, into the priſon of the ſureties, for the words be, Traditur in Ballium. But in the other caſes the words be, that ſuch and ſuch a man Ceperat without any ſuch deliuery made by the Court, as in the other Caſe.

Now forasmuch, as before it is ſaid, that Baile or Maine-prize is, when a man detained in Priſon for any offence, for which hee is Baileable or Maine-prizeable by Law, &c: I thinke it expedient to ſhew what perſons detained in Priſon, were Baileable or Maineprizeable by the Common-Lawes of this Realme, for I meane not to ſet downe the Recognizances for Baile and Mainepriſe, aſwell becauſe the ſame are common, as alſo for that my deſire is to treate of ſuch matters as are moſt materiall, as ſhortly and as compendiouſly as I can.

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4. What perſons are Baileable or Maine-prizeable by the Common-Law.

IT appeareth by a Statute made in the Parliament holden at Weſtminſter, in the third of Edward 1. commonly called Weſtm. 1. ca. 15.

that it was greatly doubted at the Common-Law, what persons were Baileable, or Mainpriseable in the Preamble of the said Statute. It is said, Raceo qui avant ceux heures ne fuit cy determine certeinement queux gentes fuer repleuiseable et queux non, &c. That is to say, Because before this time it was not certainely determined who were repleuisable to be deliuered out of Prison, and who not: so that it seemeth thereby at the Common-Law at that time great diuersity of opinions was touching the same: yet do I find a certaine rule set downe before that time touching letting of Prisoners to Baile: for Bracton who wrote in the end of the Raigne of Hen. 3. (for so it appeareth in his 3. booke and last Chapter) sayth as followeth. In omni vero injuria et transgressione cõtra pacem imo cum adjectione felonie, solet quilibet appellatus vel rectatus per pleg. dimitti, præterquam de morte hominis quocunque temp' donec imprisonatus doceat se esse immunem. (That is to say) in euery wrong and trespasse against the Peace of the King, although the offence reach to Felony, euery one that is appealed or indicted (is wont to bee Bailed) except onely in the case of the death of a man) at any time vntill he that is imprisoned shall perceiue himselfe guilty by Inquest.

F. 11. b. 16. ca. F. N. A man in Execution vpon a iudgement giuen vpon a false verdict, if he will bring an Attaint,

or

or a man in Execution vpon an erroneous iudgement, if hee will bring a Writ of Error: Or if a man Accomptant hauing Auditors assigned vnto him in Land, or in such Corporation which will allow his Ally: Or if a man being taken in Execution vppon a Statute, and will sue an Audita Querela, the party Plaintiue should haue a speciall Writ to let him to Baile vpon sufficient suertie taken, as the Cale requireth. F.N. F.N.129.

But of these and such like Bailements, my purpose is not to Discourse, but onely and principally of such Bailements as doe concerne matters of the Crowne. It appeareth by the rule of Bracton, That a man appealed and indicted of any matter of Fellony, (the Death of a man onely excepted) ought to be let to Baile without Maine-prize, which Rule as it is generall, so it hath many limitations and exceptions, which shall the better appeare and bee made manifest, if wee consider what person or persons are not Baileable, or at the least Maine-prizeable by the Common-Law of our Kingdome:

5. What Persons are not Baileable, or Maineprizeable by the Law.

FIrſt, a man indicted or impriſoned for Treaſon, is not Baileable or Maineprizeable, the ſame (as I take it) of petty Treaſon, as where the Wife killeth her Husband, the ſervant his Maſter or Miſtreſſe, or ſuch like. A man indicted, appealed, or impriſoned for the Death of a man, is in ſome caſe Bayleable, and in ſome not, and very requiſite it is to have the Law knowne in theſe caſes.

Therefore if a man be indicted as Principall of the death of a man, hee is not to be Bailed: but if hee bee indicted as Accellary before or after, hee is Bayleable. For as Bracton in his ſecond Treaty in the third Booke ca. 12. ſaith, Vbi ille de facto non eſt replegiabilis, ille de forcia per repleuium vel ballium dimittatur, donec ille de facto ſe defenderit vel non defenderit quia vbi factū, ibi poterit forcia quandoque, ſed nunquam forcia

forcia sine facto. And yet it appeareth by a Booke case in 28. Edwardi 3. folio 94. That if two parties be indicted, the one as Principall, the other as Accessary vnto the Death of a man, after the Principall be attainted (that is to say) haue iudgement of Death, or be Outlawed, the Accessary shall not in any kinde whatsoeuer, bee Baileable, which agreeth (in my iudgement) with the said opinion of Bracton, videlicet. Donec ille defenderit se de facto, vel non defenderit: But all this is to bee vnderstood in case of iudgement, at the suite of the King. For in an appeale of Murther, or Death of a man, the Law altereth in some cases.

And therefore in an Appeale of Murther, sometime the Defendant hath beene let vnto Baile, although hee hath beene Appealed as Principall, and sometime againe Baile hath beene denied him, as plainely appeareth by our Bookes.

Therefore it seemeth to rest much in the discretion of the Iudge or Iudges of the Court, vppon due and mature consideration had of the manner and circumstances of the offence, whether in that case hee is to bee Bailed or not, except (you will say) with the opinion and iudgement of the Booke in 21. Edw: the fourth.

That the Appealer in that case being neither indicted before the Coroner, nor otherwise, may be Bailed, whereby it appeareth, that if the Appealer in that case had beene indicted thereof, they would not in that case have Bailed him, which seemeth to mee (sine prejudicio melioris sententiæ) to bee a very reasonable and discreet opinion, and worthy to bee followed. And therefore may all our former Bookes which seemed to bee repugnant one to the other, be reconciled and stand well together.

In an Appeale of a man against two, the one is Principall, the other as Accessary, albeit the Principall attainted, the Accessary may be let to Baile: but otherwise it is in the case of judgements as is aforesayd. Manslaughter, a man indicted or appealed of manslaughter may bee Bailed.

Rape. 44. *E.* 3. 38. A man indicted or Appealed of Rape, hee may be Bailed, yet was that no Felony at the Common Law, untill the Statute of Westm. 2. ca. 34.

Burglarie. 44. *E.* 3. 3. A man indicted for Burglary may bee Bailed, as it appeareth by the Booke in 29. Ass. P. 44.

A man indicted or Appealed of Robbery may be bailed. Robberie.

A man Out-lawed and imprisoned may not be bailed. Westm. 1. ca. 15. Out-larie.

A man indicted as Accessary for receite of any person or persons Out-lawed, or otherwise attainted of Murther or Fellony, is not baileable. Accessarie.

Hee that is abjured the Realme ought not to bee Bailed. Abjured. Westm. 1. ca. 15.

If a man bee indicted, and doeth become an Approuer, he ought not to be bailed. Approver. Westm. 1. ca. 130.

If a man commit Fellony, and bee taken in the manner, hee ought not to bee bailed.

If a man be indicted and imprisoned for any Fellony whereof he is baileable, yet if he breake the Prison, and after be taken againe, hee ought not to be bailed. Prison breaker. Westm. 1. ca. 13.

If a man be indicted of Man-slaughter, Robbery, Rape, Burglary, Fellony, or any other Offence whereof he is Baileable; yet if he be an infamous and a notorious Thiefe, and so openly and commonly esteemed and taken, Baile may be denied him. Westm. 1. ca. 15.

A man

Manucaption in the Regiſter Conſpiracie.

A man indicted of Conſpiracy (that is to ſay) that hee with others conſpired falſly to indict another of Murther or Felony, by meanes whereof hee was indicted, and afterwards convicted, ſhall not be Bailed.

And this was the reſolution of all the Judges vppon the queſtion demaunded by King Ed. 3. himſelfe, as it appeareth by the Bookes caſe 27. aſs. p. 12.

For it appeareth by our Bookes, that a man attainted vpon Conſpiracy at the ſuite of the King, Auern le judgment per villanie; or as another Booke tearmeth it, ſhall haue a villanous judgement.

And that is, that the body of the party ſo offending ſhalbe taken, his Lands, Tenements, goods, and chattels, into the Kings hands, his Wife and Children thrownе out of his Houſe, that his Houſes be throwne downe, his Meadowes ploughed vp, his Woods ſubuerted and extirpated, that hee ſhalbe for euer diſabled to giue any teſtimony, or beare any witneſſe, and as the Booke caſe is, 24. E. 3. 34. That hee neuer preſume to approach neere vnto the Kings Court, &c. Such a precious regard the Law hath for the life and ſafety of the innocent; and ſuch is the judgement of the Common Law, againſt thoſe that vniuſtly ſeeke after the bloud of the guiltleſſe: A matter in my opinion though

though not directly pertinent to our purpose, yet not unworthy of knowledge and memory which may aswell put the Judges as Jurors in remembrance how deare in the eye of the Law the life of a man is, and by their punishments how deepely they offend, that seeke to condemne the guiltlesse, although their purpose doth not take effect.

But (to returne to our purpose) if a man bee appealed by an Appriover, and bee of good and honest fame, hee may bee bailed, during the life of the Appriover.

If a man bee indicted of any offence whereof hee may bee bailed, yet if after hee bee found guilty of the same, or otherwise, be thereof convicted, hee shall not be bailed: and that appeareth by Bracton in his second Booke, Chapter 5. where he saith, Nec sunt illi qui culpabiles inveniuntur per pleg' dimittendi: That is to say, Neither are those that are found guilty, to bee let to baile.

A man indicted for Fellony, burning of houses, ought not to be let to baile. Westm. 1. ca. 15. Burning of houses.

A man indicted for putting out of Eyes, cutting out of tongues, may be bailed. Putting out of Eyes, &c. Excom. cap.

A man taken by Certificate of the Bishop, by a writ de Excommunicato capiendo, ought not to be bailed, Westm. 1. ca. 15.

Chance-medley. A man indicted, and found guilty of the death of a man by misaduenture, or by casting of a stone ouer an house, and by chance killing a man, woman, or childe, &c. is not bailable. 3. Ed. 3. tit. Corone, 3 5 4.

Se defendendo. 35. E. 3. 42. Like Law it is, if a man indicted bee found guiltie of the death of a man se defendendo, he is not by the Law to be bailed, both which do agree with the rule of Bract. for inueniuntur culpabiles.

Penall Stat. A man indicted vpon a penall Statute, which inflicted any losse of life or member, as in case of Felony or otherwise, any corporall punishment, or losse of goods, or imprisonment, may be bailed vpõ sufficient sureties: except it be especially prouided, that the offendor in such cases shall not be let to Baile or Mainprize. As for example, if a man be indicted of Felony, publishing of any seditious bookes, &c. contrary to an act made in the 23. Eliz. he may be bailed; for the offence is made Felony, and Baile and Mainprize not prohibited.

Regula. 23. Eliz.

But on the other side, the Statute of E. 6. of forcible Entries doth for the first offence inflict two Moneths imprisonment, without Baile or Mainprize, &c. in which case the party so offending cannot be bailed.

So

So as whereſoeuer a Statute maketh any offence Felony or ſetteth downe a corporall or pecuniarie punishment for any offence, and doth not expreſſly forbid the party to be bailed, in euery ſuch caſe (the caſe put before for example) the partie ſo offending, and being thereof indicted, may be bailed.

But forasmuch as all that which hath beene ſaid doth extend to ſuch onely as be indicted of Record, or appealed of the ſaid offences, it is neceſſary to be vnderſtood, what perſons committed to priſon for any offence, or for ſuſpicion of the ſame, may before they be indicted or appealed thereof, be let to baile, and what not.

6. Chap. What perſons committed for any offence, or for ſuſpicion of the ſame, may either by the Common-Law, or by any Statute before Iudgement or appeale brought, be let to Baile or Maineprize.

IT may be collected by that which hath beene ſaid out of Bracton, that a man committed to priſon for any Felony, or ſuſpicion of Felony, could not by the Common-Law be let to Baile

before indictment or appeale brought, for his words be, In omni vero injuria & transgressione cõtra pacem Regis, imo cum adjectione felonie, solet quilibet appellatus, vel rectat' per pleg' dimitti: so as it seemeth by him that is to let to baile, must either bee appellatus or rectatus: Therefore it seemeth by the Common Law, That a man imprisoned for Felony before indictment or appeale, (except it were by writ) could not be bailed. And with that opinion seemeth to concurre that which is declared by the Statute of Westmi. 2. ca. 15. where it is declared, that by the Common Law, A man imprisoned by the commaund of the King, or his Justices, cannot be replevied or bailed, and accordingly is the Law taken in the booke, case 24. E. 3. 33. where a man for going secretly armed in Westminster Hall under his apparrell, was committed to Ward by the Justices, and was denied Baile or Maineprize, and forfeited his Armour: and that person imprisoned could not be bailed, is also proved by the Statute of 1. R. 3. ca. 3. where it is said, Raceo que divers persons sont arrestus et imprison' per suspicion' de felonie ascun foits de malice, &c. et auxi guardes in prison sans Baile ou Maineprize al tour graund vexation et trouble, &c. whereby it is that which was before collected out of the words of Bract. But here it may bee demaunded what was the reason, for Lex plus laudatur quando ratione probatur:

batur: That Iuſtices of the peace might by the Common Law baile a man indicted for Felony, and appealed thereof, but could not baile a man impriſoned vpon ſuſpicion of Felony: whereunpon might bee anſwered, that Iuſtices of the peace would not baile a ſuſpected perſon of Felony before iudgement or appeale for two cauſes.

Firſt, that no Iuſtice of Peace (for with them I will onely meddle in this Treatiſe) is a Iudge of any ſuch perſon before indictment, or appeale brought, and therefore could not let him to Baile or Mainprize: for it were abſurd to ſay, and directly contrary to the Etymologie of the word, that hee ſhould deliuer any perſons to Baile, that were not Iudges of the perſon of him that were to bee bailed.

The ſecond reaſon is, for that Iuſtices of the Peace are (before appeale brought or indictment) no Iudges of the cauſe wherefore hee is impriſoned. And therefore doth it follow, that by the Common Law they could not let ſuch perſon or perſons to Baile. But here ariſeth a ſecond queſtion as doubtfull as the firſt, why Iuſtices of ỹ peace are neither Iudges of ỹ

perſon, nor of the cauſe in the caſe aforeſaid, before indictment or appeale brought. This doubt is fully reſolued by the opinion of the whole Court in 14.H.8.16. where it is ſaid, that a Juſtice of peace is a Record, and therefore ought to proceed vpon that thing which is iudicially before him of Record.

But in the caſe before indictment or appeale brought, neither the perſon, nor the cauſe is of Record, and therefore he could not before indictment proceede either with the perſon, or with the cauſe.

And for that very reaſon it is likewiſe agreed by the whole Court in that caſe, that a Juſtice of peace cannot make out a Warrant to arreſt any man for ſuſpicion of Felony, before he be thereof indicted, and yet it is there agreed, that he may make a Warrant againſt one before any Record thereof; and this doth nothing impugne that which hath beene ſaid, Exceptio probat regulam, if the Juſtice of the peace ſhould ſtay the arreſting of ſuch perſons, as would breake the peace before they were certified thereof by matter of Record, the breach of the peace ſhould neuer be preuented: for before it be broken, there cannot any Record be made thereof, &c. Therefore in that caſe for that cauſe, the Juſtice of the peace may lawfully make out his Warrant, (as commonly

commonly is vied) although there be thereof no Record made, but then seeing by the order of the Common-Law Iustices of the peace could not baile a person suspected or imprisoned before indictment or appeals brought, it is very requisite to understand what persons committed to prison may before indictment or appeals bee let to baile by Iustice of the peace, by any Statute now in force.

7. What persons committed to prison before indictment or appeale, bee baileable by Iustices of peace, or by Statute now in force.

And first I take it, that the Statute that is principally in force for this matter, as the Statute of 1. & 2. Phil. & Ma. ca. 13. which Statute being long I will not recite, but shortly will shew what persons imprisoned before indictment or appeale, may be let to baile by Iustices of peace, and what not by force of Statute, or of any other not repealed.

A man committed for Treason, or for suspicion of Treason, cannot be bailed by Iustices of peace. Treason.

The

Petty Treason. The same Law is of petty Treason.

Murther. If a man be suspected of murther, and thereupon committed to prison, he cannot bee bailed by a Justice of peace.

But if a question may be made, whether in that case a man committed to prison upon suspition to bee accessary to Murther, whether bee before indictment may bee let to baile by the Justices of the peace, and I thinke (sine preiuditio melioris sententie) that hee cannot be bailed by them by force of the said Statute: for albeit after indictment he may be bailed, as is aforesayd, yet me seemeth, that the said Statute doth not extend to make him baileable by the Justices of peace before indictment: for the words of the Statute be, Any person or persons arrested for Manslaughter or Felony, under which words (as I take it) the meaning of the makers of the Statute, was not to include either Murther, or accessary of the same. It appeared by the expresse letter of the Statute, that a man committed to prison for Manslaughter, or suspicion of the same, may be bailed.

Manslaughter.

But the doubt is, what offences bee included within this word Felony, within the meaning of the said Statute: and therefore it is necessary to understand what is comprehended under the same.

If

If a man be committed to prison for the felonious burning of houses, or for the suspicion of the same, yet hee ought not to bee let to baile within that Statute. Burning of houses.

But a man committed for Burglary, or for suspicion of the same, may aswell before as after indictment be let to Baile within the meaning of that Statute. Burglary.

A man imprisoned for Felony, or for suspicion of the same, both breake prison, and afterwards is apprehended for the same, and therefore committed to prison, hee not to be bailed, neither before, nor after inuictment. But a man committed to prison for Robbery, or for suspicion of the same, may be let to Baile aswell before, as after indictment. And yet, hee that is a notorious Theefe, and so commonly reckoned, if hee bee imprisoned for any offence touching the Crowne, or for any matter of felony, is not baileable within the meaning of the said Statute.) Breaker of Prison. Robery. A notorious theefe.

A man imprisoned for a Rape, or for suspicion of the same, is baileable aswell before indictment, as after, (as I take it. Rape.

A man that is approued by an Approuer, except hee be of good and honest fame, ought Appeale by an approuer

not to be bailed, during the life of the Appealer.

Accessary to a Felony, attainted.

A man imprisoned for being Accessary to the rescuing or abetting of any person outlawed, or otherwise attainted for Murther or Felony, is not baileable either before, or after indictment.

Putting out of eyes, &c.

A man imprisoned for putting out of Eyes, or cutting out of Tongues, or for suspicion of the same, is baileable (as I take it) as well before, as after indictment, by the Justices of the peace, by force of the said Statute.

Taken in the manner.

If a man committ any offence whereof hee is baileable, yet if he be taken with the manner, the Justice of peace may deny him baile aswell before as after indictment, for hee is not baileable: contrarily, a man imprisoned for an offence by any penall Statute, is made Felony, may be bailed by the Justice of peace, except baile be expressly prohibited by the same, aswell before as after inditement.

As for example, it is propounded by the Statute of 3. H. 7. ca. 2. That if any Maid or Widow having Lands, Goods, or Tenements, or being heire apparant to their Ancestors, bee taken away contrary to their will, and after to such misdoer, &c. or be filed, &c. that such offence is Felony.

Now if a man bee imprisoned for such an offence, or for suspicion of the same; he is baileable by the Justices of the peace, aswell before as after inditement. Sunt talia plura quæ omnia enumerare perlongum esset, sed ista sufficient, exempli causa.

A question may bee here demanded, whether the said Statute of 1. and 2. Phil. & Mary do extend to Felons made by the Statute since the sayd Act: And I thinke without any doubt it doth: For (as I take it) that any person suspected, or imprisoned for any Felony, made by an Act of Parliament, either before, or since the said Act of 1. and 2. Phil. and Mary, may bee let to baile by the Justices of the peace, unlesse Baile and Maineprize bee expressly thereby prohibited.

But seeing such persons as are baileable by the said Statute of 1. and 2. Phil. et Ma. are to be let to baile by Justices of the peace, upon sufficient surety found, it is necessary to be understood, how many, and what Justices are requisite, and how many Sureties or Pledges are required by the Law, upon the letting of such persons let to Baile.

8. How many and what Iustices of the peace are requisite, and how many Pledges or Sureties are required by the Law.

The Iustices of peace in open Sessions of the peace, whereof the one to bee of the Quorum, both being present together, may out of the Sessions let any prisoner imprisoned to Baile, which bailement in writing subscribed, or assigned with their owne hands, they ought to certifie the next generall Gaole delivery to be holden within the same County. But if a man be indicted by proces, and imprisoned, &c. hee may bee let to baile by any Iustice of peace by the Common Law,

It appeareth by Bractons Trentise of his 3. Booke. ca. 18. that at that time hee that was to be bailed, ought to haue twelue probos & legales homines de Com' &c. and so it appeareth by an ancient booke, called the diuersity of Courts, fo. 116. 8. that in ancient time hee that could wage his Law twelue men with him, &c. as it seemeth, that all that time aswell wagers of Law, as in case of Baile. The Law is changed since that time; there ought to bee two

Pledges

Pledges or Mainprizes at the least: For mee seemeth, that the words of the Writ Manucapt' is a sufficient proofe thereof; for the words bee, Et licet frequenter abtulerit sufficien' Manucapt' qui eum manucaperent, &c. so as there must bee sufficient Manucapters, and that cannot bee unlesse there be two at the least: And (as mee seemeth) it may well bee collected by the booke in 33. E. 3. and 36. E. 3 for there it is said, Ils sont ses gardens et ils rendra dei escape, and againe one such Manucaptor: but there may a question arise, how often for one offence a man may bee let to Baile.

9. How often for one offence a man may be let to Baile.

If a man be imprisoned, indicted, or appealed for any offence, for the which hee is baileable, and is accordingly let to Baile, and afterwards make default, and doth not appeare according to the condition of his baile and his Maineprizes recognizance, and afterwards is arrested and apprehended againe, in this case a Justice of peace may deny him Baile. And that the Law should be so, is it shewed by the booke case 7. H. 4. fol. [illegible] opinion of Manuscript

 all

all the Iuſtices, where it is ſaid in the like caſe, q'e il ne ſerra my per Mainepriz apres.

But becauſe it may fall out, that to bee let to baile, may be denied to him that is baileable by the Law, it is good to ſee what remedy the Law hath prouided for the priſoner ſo detained in priſon, to be let to baile.

10. What remedy a man in priſon, and baileable by the Law, hath to be let to Baile.

HEe that is impriſoned for any offence, whereof hee is baileable by the Law, may haue a Writ de Manucaptione, directed to the Sheriffe of the ſame County, that he ſhall take ſureties of him to appeare, and to let him at large, which Writ in diuers formes, and in ſpeciall caſes appeareth in Regiſter.

It appeareth by Bracton, that in his time there was a Writ in his Do odio & Atia, touching which the words be theſe, Sed cum iniquum eſt quod innocentes, ſicut illi qui criminoſi non ſunt diu inclusi detineantur in carcere, ideo ad lachrymoſas querelas parentum et amicorum de gratia Domini Regis fieri ſolet inquiſitio utrum hujuſmodi imprisonati de morte hominis culpabiles

biles esſent de morte illa, vel de hujusmodi inquisitione nullum debet derogari, and there ſet downe the words of the Writt.

Now it is to be understood, that at that time when Bracton writ, and so long time after, the Sheriffe by writ or Commission to him directed, used to take inquiries and judgements of Murther and Felony, and to hold Pleas of the Crowne, which afterwards being denied unto him by the Statute of 2. E. 3. ca. 4. as I take it, de Odio & Atia, hath ſolt his force.

But here a question may be demanded, whether a man committing any offence upon the Sea, or within the jurisdiction of the Admiral, for the which if the same had been committed upon the Land, he might have been bayled, whether the Commissioners of the Admiralty may let him to bayle or no, either before or after indictment?

14. In what cases the Commissioners of the Admiralty may let Prisoners to Baile either before or after indictment.

As for I take it (sine præjudicio melioris sententiæ) that the Commissioners of the Admiralty

Admiralty cannot let to Baile any persons imprisoned for any offence, or for suspicion of any offence committed upon the Sea, as within the jurisdiction of the Admiralty, before the person so imprisoned, be thereof indicted, although in that case if the Felony or offence had beene done upon the Land, the party had beene bailable: and I am induced to be of that opinion for the consideration following.

First it is to be agreed, that before the Statute 28. H. 8. ca. 15. All Murthers, Robberies, Piracies, and other offences done upon the Sea, were determined by the Civill Law, which Law was in that behalfe found very defective: forasmuch as by that Law none of the said Offences so committed, could be punished without the testimony of two competent witnesses, or expresse confession of the party offending; and those dangerous and detestable offences aswell for the want of sufficient testimony, (Murther being the shadow of Piracy) as also by reason of the secrecie and indurate obstinacy of the Offender, (an incident inseparable to the Pirate, in not confessing his offence) he commonly went away without punishment. This mischiefe was remedied by the Statute 28. H. 8. ca. 15. whereby it is provided, that all Treason, Felonies, Robberies, Murthers, and confederacies after the said Act, bee committed in or upon

vpon the Sea, &c. shall bee inquired of, tried, heard, determined, and iudged in such Shires and places of the Realme, as shall be limited by the Kings Commission, to heare and determine such offences after the course of the Law of this Land, and as if the same offence had beene committed vpon the Land within the same Shire.

Of this much I gather, that hereunto the offenders were not baileable, neither by the Common Law, nor by any Statute: for how could they be baileable by the Common Law, when the offence was not determineable by the Common Law: And I finde no Statute that taketh away the tryall of those offences by the Ciuill Law, vntill the Statute of 28. H. 8. which Statute doth not make any prouision at all for letting the said offenders to Baile: Therefore I doe conclude, that without any great doubt, (as it seemeth (such Offenders before indictment, were not baileable before the Commissioners, nor by the Common Law, nor by the Statute 28. H. 8. But it may bee demanded, why the Statute of 2. and 3. Phil. et Ma. shall not extend to those Commissioners also: for within the Admirals iurisdiction they are also Iustices of peace: This question is easily resolued, as may appeare to those that will diligently perule the Statute: for they shall easily see, that the Statute doth not extend to those Commissioners for the Admiralty, but onely to those Commissioners

ſioners for the peace, for the body of the County, which as by diuers other parts of the ſaid Act, ſo doth it moſt plainely appeare by that which is therein prouided, videlicet And in caſe any Iuſtice of peace, &c. ſhall offend &c. That the Iuſtices of the Gaole deliuery for the Shire, &c. where ſuch offences ſhall happen to be committed, ſhall for euery ſuch offence ſet a Fine, &c. whereby it is euident, that ỳ ſaid Statute was meant onely to extend to Iuſtices of peace within the body of the County.

But I take it, that after indictment, the Commiſſioners of the Admiralty may let to baile ſuch perſons as are baileable by the Law: becauſe they being Iuſtices of Record, are after indictment, Iudges aſwell of the perſon offending, as of the offence it ſelfe; and therefore may deliuer ſuch perſons ſo indicted in Ballium, as I take it.

And what perſons are baileable by the Law, and what not, may appeare by that which hath beene ſaid before: this onely I will obſerue in this place, that ſeeing Murther is ſuch an incident to Piracy, I thinke that the Commiſſioners of the Admiralty, may well deny ſuch perſons as are indicted of Piracy, to be let to Baile or Maine prize, aſwell for the hainouſneſſe of the offence, as for the affinity it hath with Murther, the offenders wherein (as is aforeſaid) are not baileable.

12. How

12. How or in what ſort Baile or Maine-prize may bee diſcharged.

IF the Juſtice of the peace, do let any Priſoner that is Baileable to baile, and afterwards ariſe the Priſoner by a writ of Habeas Corpus, as the Record of the indicted be removed by a writ of Certiorarie either into the Chancerie or into the Kings-bench, the baile or Mainprize taken by the Juſtice of peace is diſcharged for ever, as it is holden in 32. of Hen. 8. tit. Mainpr. that although the record be remained be a Procedendo as it is there likewiſe holden. Maſter Statham doth report a caſe in 12. R. 2. That after indictment given, and that the Mainprizers are diſcharged, and it is not holden by the Statute of 1. Ed. 6. ca. 7. as I take it.

If the Proceſſe of any indictment be diſcontinued, the Mainprizers are diſcharged, (as I take it) and if the party prefs the Mainprizers are diſcharged; for Mors omnia ſolurt et impotentia excutat legem, as Bracton ſaith, but at the day of Appearance the Mainprizers cannot plead the death of the partie, but upon Proceſſe againſt them it muſt come in, by the returne of the Proceſſe as it is holden, and then alſo may the Mainprizers plead the ſame, as I take it, in the diſcharge of the Recognizance, and of this matter thus much ſhall ſuffice.

13. The Conclusion with Advertisement.

THe end and scope of this little Treatise is, (under correction of those of better judgement) to set forth what the Law of the Realme doth require touching Baile and Mainprize: A necessary thing (in mine opinion) for such as be Justices of the peace, to be knowne: for as he that standeth upon plaine and sure ground, although he should be beaten of rage and tempest to the ground, yet might be without danger rise of himselfe againe: so he that hath the administration of Justice, and in all his occasions is guided and directed by the rule of the Law, neither abusing his authority, nor exceeding his Commission, standeth on a sure ground, which will beare him up at all seasons: Sapientis est cogitare (saith Cicero) tantum esse permissum quantum commissum & creditum. And good was the Counsell (as those that follow it finde) whosoever gave it, (videlicet) exceed not thy Commission: And albeit it is truely said, quod judicium est legibus & non exemplis: And as the Civilian saith, Exemplademonstrant, non probant; yet undoubtedly it is a great contentment and satisfaction to an honest minde and a good conscience, especially in cases that concerne the life and liberty of a man, to follow the precedent of

of grave and reuerend men: howbeit sometimes
as old and Lawes are inuented, and made for
the repelling of those euils that most commonly
happen: For ad eaqua frequentius accidunt jura
adoptantur, and principally doe respect the ge-
nerall peace and profit of the people: and there-
fore we vse to say, that a mischiefe is rather to be
suffered then an inconuenience: That is to say,
that a priuate person should be punished or dam-
nified by the rigour of the Law, then a generall
rule of the Law should be broken, to the ge-
nerall trouble and preiudice of many. It is there-
fore very necessary, that the Law and discretion
should bee Concomitant, nay the one to be an
accident inseparable to the other, so as neither
Law without discretion, least it should incline
to rigour, nor discretion without Law, least
confusion should ensue, should bee put in vre:
my meaning herein, is not to allow of euery
mans discretion that sitteth on the seate of Iu-
stice: (for that would bring forth a monstrous
confusion) But I meane that discretion, that a-
riseth by the right discerning, and due consi-
deration of the true and necessary circumstan-
ces of the matter: and as I was commonly vse to
say, that Common Law is nothing else but
common reason; and yet in mine owne iudge-
ment, there is no common reason wherein
with a man is naturally indued, but that per-
fection of reason which is gotten by long and

continuall study: so in associating discretion to weare ye Law, it is not meant to preferre it to that society: such mans discretion, which commonly rather deserueth the name of affection and selfe-will: then of discretion indeed: but that discretion onely we allow of in this place, that either graue and reuerend men haue vsed in such cases before, or rise of the circumstances of the matter: (as is aforesaid) As for example, being not also impertinent to the matter of our Treatise, if it were a question, whether in an appeale of Maime, the defendant were to bee let to Baile or Mainepryze, or no. It is necessary to be examined, whether the manner of the Maime were horrible or hainous: for the defendant may be denied Baile and Mainepryze: whether the same were done vpon a sudaine affray, or of the plaintiffes assault, or against the intent of the defendant, &c. For the defendant may bee let to baile: and this I take to be a lawfull discretion, for to ỹ and is ỹ booke, reason of ỹ booke in 6. H. 7. fo. 2. wherein an appeale of Maime, the Iustices of ỹ Kings Bench denied ỹ defendant to bee bailed; for ỹ vpon the examination of the matter it appeared to be most cruell & horrible, and therfore in respect of ỹ abhominable haineusnes of ỹ fame; the Iustices would not suffer the defendant to be bailed: and with this agreeth ỹ opinion of Bract. in ỹ 2. treatise of his 3. booke, ca. 8. Appellati vero de morte hominis, &c de quitis de plagis

Plagis periculosis saltem capiantur, et in prisonam detrudantur, et ibi custodiantur, donec per Dominum Regem per Pleg' dimittantur, vel per Iudicem deliberantur, &c. whereby I note that he saith, plag' periculosis, insinuating a difference inter plagas periculosas, & minus periculosas, in that he saith, Donec per Dominum Regem per pleg' dimittantur, it is to bee understood, vntill by that Court the offence be determined and Iudged, they bee let to Baile, and this particular may suffice to the resolution of the generall.

To conclude, the Author of all wisedome and true knowledge, thought it requisite, that those that were Iudges of the earth, should be both wise and learned, whom I beseech God to blesse with his true knowledge and wisedome.

FINIS.

FINIS.

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